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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. — 73-963

DRAVO CORPORATION, S. J. GROVES & SONS CORPORATION and GUST K. NEWBERG CONSTRUCTION CO.,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, ATTORNEY GENERAL, DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS and BARNEY J. GRABIEC, DIRECTOR OF THE DEPARTMENT OF LABOR OF THE STATE OF ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT FIFTH DISTRICT

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KEENAN PRINTING COMPANY

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT FIFTH DISTRICT

Petitioners, Dravo Corporation, S. J. Groves & Sons Company and Gust K. Newberg Construction Co., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois for the Fifth District entered March 14, 1973.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fifth District is reported at 10 Ill. App. 3d 944. The Order of the Supreme Court of Illinois denying leave to appeal without opinion is unreported.

JURISDICTION

The judgment of the Appellate Court was entered March 14, 1973 and rehearing was denied April 24, 1973. Leave to appeal was denied by the Illinois Supreme Court on September 26, 1973, and on October 9, 1973 the mandate was stayed pending petition to this Court for writ of certiorari. This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 USC 1257.

QUESTION PRESENTED

Is it a denial of due process of law for an Illinois State Court to entertain an action to declare property as being within the territorial jurisdiction of Illinois in order to support assessment of taxes on activities on said property where another State, Kentucky, actively makes claim to such property and the power to tax activities thereon as within its territorial jurisdiction where Kentucky (a) is not and cannot be made a party to the Illinois proceedings, (b) will not be bound thereby, and (c) is itself assessing taxes on the premise that the same land is in Kentucky?

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. 28 USC, § 1251. Original jurisdiction:

> "(a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> (1) All controversies between two or more States."

STATEMENT OF THE CASE

Petitioners are General Contractors and have been awarded, as Joint Venturers, a construction contract by the U.S. Corps of Engineers, Department of the Army, in the amount of $85,000,000.00, for construction of a lock on an Island known as Dog Island in the Ohio River. Respondents, being the Illinois Attorney General, Director of Revenue and Commissioner of Unemployment Compensation, filed suit in an Illinois State Court shortly after the contract was awarded, alleging that Dog Island, the site of the work, was located in Illinois, and petitioners therefore were and would become liable for payment to the State of Illinois of unemployment

compensation contributions and income tax, and were also required to withhold and pay to Illinois taxes on income paid to employees of petitioners engaged in the construction work.

Petitioners had been informed by the Corps of Engineers that Dog Island was located in Kentucky, and upon notice to the State of Kentucky of the claims of Illinois, Petitioners were advised that Kentucky claimed jurisdiction of Dog Island and the power to assess taxes predicated upon activities thereon. These taxes included unemployment compensation contributions, use tax, income tax and withholding tax.

Petitioners herein moved to dismiss the complaint, which motion was supported by affidavit, averring that Dog Island was claimed by Kentucky to be within the territorial jurisdiction of Kentucky, and petitioners were alleged to be subject to Kentucky tax upon activities performed on the Island. Letters from certain Kentucky officials setting forth Kentucky's claims were attached to the affidavit.

Petitioners' motion to dismiss contended inter alia that (a) the controversy was in fact a controversy between Illinois and Kentucky which was within the exclusive jurisdiction of the Supreme Court of the United States, and (b) since the Illinois Court could not, by a decision that Dog Island was in Illinois, bind Kentucky and thus bar a Kentucky Court from finding that Dog Island was in Kentucky and Petitioners were liable for Kentucky taxes, it would be a denial of due process of law for the Illinois Court to proceed to determine the location of the Island and petitioners' tax liability. The Circuit Court of Pope County dismissed the complaint, expressly finding:

> "The Court finds that since the Court's order in this case could not bind the State of Kentucky, to proceed further would be a denial of due process of law."

The Appellate Court for the Fifth District reversed the trial court, holding that the Court should proceed to determine in which State Dog Island lies. The question presented herein was raised on appeal and directly passed upon by the Appellate Court. See Appendix A.

The Illinois Statutes involved are the Unemployment Compensation Act (Illinois Revised Statutes, 1971, Chapter 48, paragraphs 300-820) and the Income Tax Law (Illinois Revised Statutes, 1971, Chapter 120, paragraph 1-101, et seq.).

The Kentucky Statutes involved are the Income Tax Law (KRS 1972, 141.010-141.990) the Unemployment Compensation Law (KRS 1972, 341.005-341.990) and the Sales and Use Tax Act (KRS 1972, 139.010-139.990). Material portions of these statutes are reprinted in Appendix B.

A comparison of the Income Tax Statutes shows that the tests for allocating in State and out of State income are practically identical.[1] Each Statute sets up three factors: the property factor, the payroll factor and the sales factor, and the key language triggering the application of the Statute is: to the property factor, use of the property *in the State;* to the payroll factor, compensation

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1. The income tax imposed by each State is in the same form as that before this Court in *Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 3 L. Ed. 2d 421, 79 S. Ct. 357 (1959), and no suggestion is made that the tax as such is constitutionally impermissible. However, this Court's comment there that "logically it is impossible, when the tax is fairly proportioned, to have the same income taxed twice" (p. 462) did not foresee the ingenuity of Illinois and Kentucky.

for services performed *in the State,* and to the sales factor, performance of the income producing activity *in the State.* Thus the incidence of the tax depends entirely on whether Dog Island is in Kentucky or in Illinois, The duty to withhold taxes from employees and remit them to the State also depends on whether the employment is within or without the State.

The payment of unemployment contributions also depends on whether employment is within the state.

Thus the obligation to pay income tax, the obligation to pay withholding tax and the obligation to pay unemployment contributions is entirely dependent on the location of the work.

ARGUMENT

I.

THE DECISION OF THE ILLINOIS APPELLATE COURT IS IN CLEAR CONFLICT WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN WESTERN UNION TELEGRAPH CO. VS. COMMONWEALTH OF PENNSYLVANIA, 368 U.S. 71, 82 S. CT. 199, 7 L. ED. 2d 139 (1961) AND RESULTS IN A CLEAR DENIAL OF PETITIONERS' RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Appellate Court's disregard of the principal enunciated by this Court in *Western Union* v. *Commonwealth of Pennsylvania*, 368 U.S. 71, 82 S. Ct. 199, 7 L. Ed. 139 (1961) and other cases, places petitioners in a position where they may be forced, because of irreconcilable but independent State determinations of territorial jurisdiction over the location of the site of certain work, to pay millions of dollars in taxes to each of two States where the land, which as a matter of law controls the incident of the tax, can clearly lie only in one.

As indicated in the Statement of the Case, both Illinois and Kentucky have adopted various taxing statutes wherein the incidence of the tax arising out of construction activities depends entirely upon territorial jurisdiction over the land which is the site of the work. Each State claims that the Island upon which the work is being performed is in the State making claim thereto, and each State adamantly refuses to initiate an action in this Court for determination of the issue in a forum wherein

the real parties in interest, the two States, may be heard and the matter finally resolved. Indeed, each State has repaired to its own Courts seeking a determination that the land lies within that State, thus avoiding direct conflict with the real adversary and placing petitioners in a position where petitioners may be forced to pay taxes to each State in spite of the logically irrefutable fact that the land cannot be in both States.[2]

The Appellate Court, in the decision this Court is asked to review, holds that each State may constitutionally do this. This Court in *Western Union Telegraph Co.* v. *Commonwealth of Pennsylvania, supra,* has held that the States may *not* constitutionally do this.

Inasmuch as Western Union is on all fours, detailed analysis is appropriate. Pennsylvania and New York (as most States) have escheat laws providing that certain funds, if "property within" the particular State, are escheated to the State if unclaimed after passage of a stated period of time.

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2. Petitioners, during the pendencey of the Illinois proceedings, made payments of tax to Kentucky predicated on the fact that the construction contract indicated that the work was located in Kentucky. Since the decision of the Illinois Supreme Court denying leave to appeal, petitioners have felt constrained to withhold payments of tax pending action by this Court. Kentucky has followed the script indicated by Illinois and approved by the Illinois Appellate Court by commencing administrative actions for enforcement of the Unemployment Compensation Act and judicial action for enforcement of taxes claimed due to Kentucky. (Commonwealth of Kentucky v. Dravo Corp. et al, Franklin Circuit Court, No. 4398.) Taxes, as hereinbefore indicated, are predicated on the location of the Island in Kentucky.

Pennsylvania customers of Western Union had availed themselves of a particular service of Western Union where these customers deposited money in Pennsylvania offices for transfer to other States, including New York. In several instances the payees did not pick up the funds in the other State and in several of such instances Western Union was unable to make refund to the original sender. Pennsylvania sought to escheat undisbursed money held by Western Union arising out of money orders bought in Pennsylvania. Western Union defended on the grounds that these same funds could be and indeed had been claimed by other States, particularly New York, based on a variety of claimed jurisdictional bases. Western Union further argued that Pennsylvania's decision holding the money to be "property within Pennsylvania" could not protect Western Union from a decision of the Courts of other States holding the exact same funds to be "property within" the jurisdiction of the other States.

The United States Supreme Court said (p. 76):

> "We find it unnecessary to decide any of Western Union's contentions as to the adequacy of notice to and validity of service on the individual claimants by publication. For as we view these proceedings, there is a far more important question raised by this record—whether Pennsylvania had power at all to render a judgment of escheat which would bar New York or any other state from escheating this same property.
>
> "Pennsylvania does not claim and could not claim that the same debts or demands could be escheated by two states. See Standard Oil Co. v. New Jersey, 341 U.S. 428, 443, 95 L. Ed. 1078, 1090, 71 S. Ct. 822. And our prior opinions have recognized that when a state court's jurisdiction purports to be based, as here, on the presence of property within

the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment. Anderson Nat. Bank v. Luckett, 321 U.S. 233, 242, 243, 88 L. Ed. 692, 702, 703, 64 S. Ct. 599, 151 ALR 824; Security Sav. Bank v. California, 263 U.S. 282, 286-290, 68 L. Ed. 301, 306-308, 44 S. Ct. 108, 31 ALR 391. *Applying that principle there can be no doubt that Western Union has been denied due process by the Pennsylvania judgment here unless the Pennsylvania courts had power to protect Western Union from any other claim including the claim of the State of New York that these obligations are property 'within' New York* and are therefore subject to escheat under its laws. But New York was not a party to this proceeding and could not have been made a party, and, of course, New York's claims could not be cut off where New York was not heard as a party. Moreover, the potential multistate claims to the 'property' which is the subject of this escheat make it not unlikely that various States will claim in rem jurisdiction over it. Therefore, Western Union was not protected by the Pennsylvania judgment, for a state court judgment need not be given full faith and credit by other states as to parties or property not subject to the jurisdiction of the court that rendered it . . .

"But even if, as seems unlikely, no other state will assert such a claim, the active controversy between New York and Pennsylvania is enough in itself to justify Western Union's contention that to require it to pay this money to Pennsylvania before New York has had its full day in court might force Western Union to pay a single debt more than once and thus take its property without due process of law.

"Our Constitution has wisely provided a way in which controversies between states can be settled

without subjecting individuals and companies affected by those controversies to a deprivation of their right to due process of law. Article 3 of § 2 of the Constitution gives this Court original jurisdiction of cases in which a state is a party. The situation here is in all material respects like that which caused us to take jurisdiction in Texas v. Florida, 306 U.S. 398, 83 L. Ed. 817, 59 S. Ct. 563, 121 ALR 1179. There four states sought to collect death taxes out of an estate. The tax depended upon the domicile of the decedent, and this Court said that 'By the law of each state a decedent can have only a single domicile for purposes of death taxes. . . .' Id. 306 U.S. at 408. Thus, there was only one tax due to one state. The estate was sufficient to pay the tax of any one state, but the total of the claims of the four states greatly exceeded the net value of the estate. For this reason, as we said, the risk of loss to the state of domicile was real and substantial, unless we exercised our jurisdiction. Under these circumstances we exercised our original jurisdiction to avoid 'the risk of loss ensuing from the demands in separate suits of rival claimants to the same debt or legal duty.' Id. 306 U.S. at 405. The rival state claimants here, as in Texas v. Florida, can invoke our original jurisdiction. . . .

". . . It is plain that Pennsylvania courts, with no power to bring other states before them, cannot give such hearings. They have not done so here; they have not attempted to do so. As a result, their judgments, which cannot, with the assurance that comes only from a full trial with all necessary parties present, protect Western Union from having to pay the same single obligation twice, cannot stand. When this situation developed, the Pennsylvania courts should have dismissed the case." (Emphasis supplied).

The Supreme Court of the United States, in *Pennsylvania* v. *New York,* 407 U.S. 206, 92 S. Ct. 2075, 32 L.

Ed. 2d 693, the case in which it exercised original jurisdiction over the dispute brought before it as an original action as a consequence of its decision in *Western Union*, characterized its original *Western Union* decision very succinctly:

> ". . . the State Court judgment denied Western Union due process of law because it could not protect the company against rival claims of other States." (p. 209)

As indicated above the result of the Appellate Court's decision will be to subject petitioners to the possibility of each State finding Dog Island to be located in the particular State and assessing taxes against petitioners on that basis, which is the very result the Supreme Court has held to be violative of due process.

The Appellate Court's entire decision is based on its misconception of the issue in the case, which is made apparent from the very first line of the Appellate Court's decision, which is: "The question in this appeal is, literally, where is Dog Island?" In no way is the issue the actual physical location of Dog Island. Petitioners, contrary to the assertion of the Appellate Court with reference to petitioners' motion, do not contend that Dog Island is part of Kentucky or part of Illinois. On the contrary, petitioners' position simply is:

1. Both the States of Illinois and Kentucky claim jurisdiction of Dog Island upon which work is being performed by petitioners, and seek taxes from petitioners based upon the Island being in such States.

2. Neither the Illinois Courts, the Kentucky Courts nor any Court in the United States, other than the Supreme Court of the United States, can obtain jurisdiction

over Illinois and Kentucky to resolve the controversy on this issue.

3. As a necessary corollary to the above, Illinois, if permitted to proceed, cannot adjudicate the rights of Kentucky so as to prevent assertion of liability against petitioners by Kentucky on the grounds that the land lies in Kentucky. Thus Ilinois may assess taxes against petitioners on the basis that the land lies in Illinois, and Kentucky may simultaneously assess taxes against petitioners on the basis that the land lies in Kentucky.

4. Since the Illinois Court cannot protect petitioners from the risk set out in the foregoing paragraph, it is a denial of due process to proceed with the case and subject petitioners to the aforesaid risk.

Thus we emphasize that the location of Dog Island as such is not the issue; rather, the issue is can Illinois protect petitioners from a decision by each State that Dog Island lies in that respective State thus making petitioners subject to unconstitutional double taxation upon the same item in each State?

The Appellate Court underscored its misconception of the issue by its reliance on *Durfee* v. *Duke*, 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed. 2d 186. *Durfee* v. *Duke* was a case where there was a dispute between two non-sovereign litigants, a Nebraska plaintiff and a Missouri defendant, over title to certain land. Defendant claimed title, that the land was in Missouri and that the Nebraska Court lacked jurisdiction because the land was in Missouri. The Nebraska Court rejected all these contentions and was upheld by the State Court of Appeals. Subsequently, the Missouri defendant sued the Nebraska plaintiff in a Missouri Court and sought to avoid the res judicata

effect of the Nebraska judgment by reiteration of its argument that the land was in Missouri and that the Nebraska Court therefore lacked jurisdiction. The U.S. Supreme Court held that full faith and credit required recognition of the Nebraska judgment, holding that "once the matter has been fully litigated and judicially determined", it cannot be "retried in another State in litigation *between the same parties.*" (p. 115) (Emphasis supplied).

The Court went further saying (p. 115):

> "It is to be emphasized that all that was ultimately determined in Nebraska litigation was title to the land in question as between the parties to the litigation there. Nothing there decided, and nothing that could be decided in litigation between the same parties or their privies in Missouri, could bind either Missouri or Nebraska with respect to any controversy they might have, now or in the future, as to the location of the boundary between them, or as to their respective sovereignty over the land in question . . . Either State may at any time protect its interest by initiating independent judicial proceedings here."

Thus *Durfee* v. *Duke* was a case where *all* claimants of interest were before the Nebraska Court enabling full litigation of the issue with the resultant res judicata effect.

If this was a suit in Illinois between Smith and Brown, each of whom claimed title to Dog Island, a suggestion by Smith that the Island was in Kentucky would not oust Illinois of jurisdiction to determine where the land was, and the Illinois judgment would bar the loser from suing in Kentucky. But here the controversy is not between Smith and Brown, it is between Kentucky, Illinois and the petitioners. Kentucky is not and cannot be made a party, no court other than the Supreme Court of the

United States may obtain jurisdiction of all the parties in one action, and petitioners are subject to suit and possible defeat by each State in each State's own Courts.

As further authority for its decision the Appellate Court relied on *Standard Oil Co.* v. *State of New Jersey*, 341 U.S. 428, 95 L. ed. 1078, 71 S. Ct. 822. Astonishingly, the Appellate Court concluded that this decision was in conflict with the *Western Union* decision and, even more astonishingly, followed the *earlier* decision of *Standard Oil* rather than *Western Union*. Not only did the Appellate Court ignore the *Western Union* Court's explanation of why *Standard Oil* was inapplicable to the situation there (and here) presented, the Appellate Court ignored the language in *Standard Oil* showing the *Standard Oil* Court did not find *Standard Oil* in the position in which petitioners are placed. The Supreme Court said:

> ". . . The debts or demands represented by the stock and dividends having been taken from the appellant company by a valid judgment of New Jersey, the same debts or demands *against appellant* cannot be taken by another State.
>
> ". . . The claim of no other State to this property is before us and, of course, determination of any right of a claimant State *against New Jersey* for the property escheated by New Jersey must await presentation here." (p. 443) (Emphasis supplied).

Thus *Standard Oil* clearly states that the company will not be charged with double liability and the claim of any other State must proceed against New Jersey in the Supreme Court of the United States.

In this case Kentucky cannot be told to sue Illinois for the taxes if Illinois collects from petitioners as a result of an Illinois judgment. As the Appellate Court has recog-

nized in its opinion, the Illinois decision will not affect Kentucky and Kentucky will be free to pursue petitioners in the Kentucky courts, which is precisely the situation said to constitute a denial of due process in *Western Union*.

Lest it be suggested that the principle that it is a denial of due process to be subjected to possible double liability under the circumstances here presented must be limited to escheat cases, we refer the Court to *Texas* v. *Florida*, 306 U.S. 398, 83 L. Ed. 817, 59 S. Ct. 563, wherein the Supreme Court of the United States took jurisdiction of a case involving State tax claims by several States which turned on the question of domicile to prevent "a loss which might otherwise result from the independent prosecution of rival but mutually exclusive claims" (p. 407).

While the instant case, due to the tremendous amount of taxes involved, is of major importance to the parties, it is submitted that this Court's refusal to pass upon the question here presented may well encourage a multitude of similar State Court actions in the future as the United States proceeds to make use of its rivers for generation of power and harnessing the sometimes destructive forces of nature. Rivers bound many States, and while the boundaries are generally clearly stated, river action many times has the effect of drawing into question the physical location of actual boundaries from time to time. Indeed, this Court has been called upon innumerable times to resolve controversies of this exact nature. Illustrative of such cases is *Iowa* v. *Illinois*, 147 U.S. 1, 37 L. Ed. 55, 13 S. Ct. 239 (1892) where the Court said:

"The Mississippi river flows between the states of Iowa and Illinois. It is a navigable stream and constitutes the boundary between the two states; and the controversy between them is as to the position of the line between its banks or shores which separates the jurisdiction of the two states *for the purposes of taxation* and other purposes of government." (Emphasis supplied). (p. 2)

If each State bordering a river is free to proceed in its own courts to determine its jurisdiction in river islands or a river bed, without obligation to make a contending State a party, contractors will be called upon to establish or resist establishment of territorial jurisdiction in actions where the contractor, an innocent party who is willing to pay his taxes (but only once), must bear the brunt of a dispute between the contesting States with a very real danger of being the loser in both States and thus being forced to pay double taxes. If such a danger exists it will bring a serious problem to the United States Government itself, for contractors must price into a contract those items which they cannot safely exclude.

In the instant case, if the petitioner had anticipated the possibility of paying taxes in both States, which is now a very real possibility, and had bid accordingly, the contract price would have far exceeded $85,000,000.00.

In the instant case, if the contending States were private parties, petitioners could join the rival claimants in a single action and simply make payment as a Court ultimately directed. The sovereign character of the adverse claimants, however, prevents petitioner from accomplishing this because of the Eleventh Amendment.

It is respectfully submitted that the principles of State sovereignty causing the adoption of the Eleventh Amend-

ment were not in any way intended to create the situation exemplified by this record, or that such principles would be in any way abrogated or nullified if this Court preserved to itself exclusive jurisdiction over the controversy shown herein, which is obviously the type of controversy between States which should be resolved by this Court. "Our constitution has wisely provided a way in which controversies between States can be settled without subjecting individuals and companies affected by those controversies to a deprivation of the right to due process of law." *Western Union, supra* (p. 77) This is a classic case for the invocation of this doctrine.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully pray that the Court issue its writ of certiorari to review the judgment of the Appellate Court of Illinois, Fifth District, entered in this case.

Respectfully submitted,

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APPENDIX A

No. 72-92

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS EX REL. WILLIAM J. SCOTT, Attorney General of the State of Illinois et al., *Plaintiffs-Appellants,* vs. DRAVO CORPORATION, a corporation et al., *Defendants-Appellees.*	Appeal from the Circuit Court of Pope County, Illinois. Hon. R. Gerald Trampe, Judge Presiding.

MR. JUSTICE JONES delivered the opinion of the court:

The question in this appeal is, literally, where is Dog Island?

Although the Illinois Constitution of 1970 is silent on the subject, article I of the Illinois Constitution of 1870 fixes the boundary line of Illinois with Kentucky along the Ohio River on its northwestern shore. When Virginia ceded to the United States the Northwest Territory, in the year 1784, she retained title to the bed of the Ohio River to the low-water mark on its north or northwest

side. When Kentucky became a State she succeeded to the rights of Virginia.

It is stated in *Joyce-Watkins Co.* v. *Industrial Commission*, 325 Ill. 378, 156 N.E. 346, that "The rule is that when a stream dividing coterminus States alters its channel by a gradual or imperceptible process of wear or alluvion the boundary shifts with the stream. Where a river is declared to be the boundary between States the river as it runs continues to be that boundary although it may have changed its course from natural causes by imperceptible wear, but if it suddenly changes its course or deserts its original channel the boundary remains in the middle of the deserted river bed. (Citations.) Considering the analogy of such a boundary line to one designated as "low-water mark," constituting the boundary between Illinois and Kentucky, we are of the opinion that in the absence of a showing of sudden or perceptible changes in the course of the river the low-water mark of the Ohio river as referred to in the designation of the boundary between Illinois and Kentucky is to be determined by the evidence as to the point to which the waters of that river have receded at its lowest stage."

In the case at hand complaint for declaratory judgment was filed in the circuit court of Pope County, Illinois by the People of the State of Illinois ex rel. William J. Scott, Attorney General, The Department of Revenue of the State of Illinois and Barney J. Grabiec, Director of the Department of Labor of the State of Illinois as plaintiffs against Dravo Corporation, a corporation, S. J. Groves & Sons Company, a corporation and Gust K. Newberg Construction Company, a corporation as defendants. The complaint recites that defendants have entered into con-

tracts with the Army Corps of Engineers to perform construction work on Dog Island, alleged to be in Pope County within the territorial limits of the State of Illinois. It further alleges that the boundary of the State of Illinois extends to a line which represents the low-water mark on the northwest shore of the Ohio River and the low-water mark has at times past and times relevant to determining the Illinois-Kentucky boundary been located such that Dog Island was not an island but rather was attached by dry land to the State of Illinois. By reason of the location of the construction work by defendants in the State of Illinois the defendants are required to comply with the laws of the State of Illinois, including the Illinois Income Tax Act and Unemployment Compensation Act. Plaintiffs have demanded defendants' compliance with those statutes but defendants have advised the plaintiffs that they consider Dog Island to be within the State of Kentucky and that therefore their work will be governed by the laws of Kentucky and they are not liable to comply with the Illinois Income Tax Act or Unemployment Compensation Act. The complaint prays a declaratory judgment that Dog Island is within the territorial limits of the State of Illinois and that defendants are required to comply with the Illinois Income Tax Act and Unemployment Compensation Act.

Defendants appeared together and filed a motion to dismiss the complaint upon the grounds, as pertinent to this appeal, (1) that Dog Island is part of and under the jurisdiction of the State of Kentucky which has not been made a party to the proceeding; (2) in view of the conflicting claims of jurisdiction over Dog Island a complete determination of the issues may not be had without the presence in the case of the State of Kentucky and it

is an indispensable party; (3) because of the controversy between the State of Illinois and the State of Kentucky the Supreme Court of the United States has exclusive jurisdiction of the case; and (4) inasmuch as the decision of the Illinois court in the present posture of the case cannot constitute a bar to proceedings by Kentucky in its courts for collection of Kentucky taxes, it would be a denial of defendants' rights to due process under the fourteenth amendment to the Constitution of the United States for the Illinois court to maintain or exercise jurisdiction in the matter. Attached to the motion to dismiss is an affidavit of an attorney for the defendants which states that the three defendants are a joint venture engaged in the performance of a contract for the United States Government in the Ohio River on an island known as Dog Island; that various departments of the State of Kentucky have contended that Dog Island is within the Commonwealth of Kentucky and the joint venturers are therefore subject to certain taxes imposed by said State as more fully appears from exhibits A and B attached. Exhibit A to the affidavit purports to be a letter from the Commissioner of Revenue of Kentucky addressed to the three defendants. The letter states in essence that it has come to the attention of the department that the defendants are engaged in a joint venture on the Ohio River in the vicinity of Dog Island located near Smithland; since Kentucky has jurisdiction over the Ohio River to the low-water mark on the northern shore defendants will be liable for sales and use taxes on tangible personal property used and consumed in the construction operations and for the withholding of income tax on salaries paid to employees while engaged in the project and for corporation income taxes on profits from the operation.

Exhibit B to the affidavit purports to be a letter from the General Counsel of the Bureau of Employment Security of Kentucky. It is addressed to an attorney for the defendants and notifies him that Kentucky claims the defendants will be subject to unemployment insurance tax on wages paid to employees in the construction of the Ohio River dam at or near what is know as "Dog Allen" near Smithland, Kentucky. The letter also claims that "Dog Allen" is south of the Ohio River low-water mark of the river's northwest shore and consequently is a part of the Sovereign Commonwealth of Kentucky and has been recognized as such since the border line was established. The letters described as exhibits A and B are both dated almost a month after the filing of the complaint.

After argument on the motion the trial court entered an order dismissing plaintiffs' complaint. The only finding in the order was as follows:

> "The Court finds that since the Court's Order in this case could not bind the State of Kentucky, to proceed further would be a denial of due process of law."

Plaintiffs appeal. We reverse.

The issue here, as in the court below, revolves around the associated questions of the judicial jurisdiction of the Illinois court over the cause of action as alleged in plaintiffs' complaint and whether the defendants will be deprived of due process of law as guaranteed in the fourteenth amendment to the United States Constitution if the case is permitted to proceed in the State Court.

This suit is by the State of Illinois against three corporations with which it has a close affinity, one is char-

tered in Illinois and two possess certificates of authority to conduct business in Illinois. The applicable statute grants the latter two the same rights and privileges as domestic corporations and subjects them to the same duties, restrictions, penalties and liabilities. (Ill. Rev. Stat., ch. 32, sec. 157.103.) The action, then, is essentially one between a State and its corporate citizens. There is no question of notice and opportunity for hearing.

Defendants' principal reliance is placed upon the case of *Western Union Telegraph Company* v. *Commonwealth of Pennsylvania*, 368 U.S. 71, 82 S. Ct. 199, 7 L. Ed. 2d 139. In that case the State of Pennsylvania, proceeding in its State court, sought to escheat certain obligations of Western Union, consisting of unclaimed telegraphic money orders and the like. The unclaimed monies were alleged to be properties within Pennsylvania. By reason of the unclaimed money orders large sums of money due from Western Union to the payees of those money orders had accumulated in the company's offices and bank accounts throughout the country. Pennsylvania's complaint was directed specifically against the amount of undispersed money held by Western Union arising out of money orders bought in Pennsylvania offices to be transmitted to payees in Pennsylvania and other States, chiefly other States. Western Union was a New York corporation with its principal place of business in that State. It contested Pennsylvania's right to escheat the funds, urging that a judgment of escheat for Pennsylvania in its courts would not protect the company from multiple liability either in Pennsylvania or in other States. It argued that senders of money orders and holders of drafts would not be bound by the Pennsylvania judgment because service by publication did not give the State court jurisdiction. The

Supreme Court declined consideration of the adequacy of notice and validity of service on the individual claimants by publication, rather, they found a far more important question raised by the record—whether Pennsylvania had power at all to render a judgment of escheat which would bar New York or any other State from escheating the same property. They noted that their prior opinions have recognized that when a State court's jurisdiction purports to be based on the presence of property within the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment. Upon applying that principle the court held that Western Union had been denied due process by the Pennsylvania judgment unless the Pennsylvania courts had power to protect Western Union from any other claim, including the claim of the State of New York; that the obligations are property "within" New York and are therefore subject to escheat under its laws. Since New York was not a party to the proceeding in the State court and could not have been made a party, Western Union was not protected by the Pennsylvania judgment, because a State court judgment need not be given full faith and credit by other States as to parties and property not subject to the jurisdiction of the court that rendered it. The court's opinion was apparently in some conflict with its holding in *Standard Oil Co.* v. *State of New Jersey*, 341 U.S. 428, 71 S. Ct. 822, where it said that "The debts or demands * * * having been taken from the appellant company by a valid judgment of New Jersey, the same debts or demands against appellant cannot be taken by another state.

The Full Faith and Credit Clause bars any such double escheat." But that case was distinguished because an actual controversy between States was found to exist in the Western Union case, as demonstrated by the fact that the State of New York was present and participated in the case before the Supreme Court as *amicus curiae* and had, in fact, already escheated some of the funds sought by Pennsylvania. The court concluded by stating that multiple claims of power to escheat should be considered only when all interested States—along with all other claimants—can be afforded a full hearing. Since the Pennsylvania courts, with no power to bring other States before them, cannot give such hearing their judgments cannot protect Western Union from having to pay the same obligation twice and such judgment therefore cannot stand.

Defendants align the case before us with *Western Union Telegraph Co.* contending that since Kentucky is not and cannot be a party in the Illinois court, Kentucky need not accord full faith and credit to the Illinois judgment and will be free to pursue remedies in its own courts. Accordingly, the argument runs, defendants will be subjected to taxation by two States for the same activity and thereby deprived of due process of law.

The plaintiffs, for their part, rely upon the case of *Durfee* v. *Duke*, 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed. 2d 186. In that case the petitioners, in 1956, brought an action against the respondent in a Nebraska court to quiet title to certain bottom land situated on the Missouri River. The main channel of that river forms the boundary between the States of Nebraska and Missouri. The Nebraska court had jurisdiction over the subject

matter of the controversy only if the land in question was in Nebraska. Whether the land was Nebraska land depended entirely upon a factual question—whether a shift in the river's course had been caused by avulsion or accretion. The respendent appeared in the Nebraska court and through counsel fully litigated the issues, explicitly contesting the court's jurisdiction over the subject matter of the controversy. After a hearing the court found the issues in favor of the petitioners and ordered that title to the land be quieted in them. Upon appeal the Supreme Court of Nebraska affirmed. The State Supreme Court specifically found that the rule of avulsion was applicable, that the land in question was in Nebraska, that the Nebraska courts therefore had jurisdiction of the subject matter of the litigation, and that title to the land was in the petitioners. Two months later the respondent filed a suit against the petitioners in a Missouri court to quiet title to the same land. Her complaint alleged that the land was in Missouri. The suit was removed to a Federal District Court by reason of diversity of citizenship. The District Court after hearing evidence expressed the view that the land was in Misouri, but held that all the issues had been adjudicated and determined in the Nebraska litigation, and that the judgment of the Nebraska Supreme Court was *res judicata* and "is now binding upon this court." The Court of Appeals reversed, holding that the District Court was not required to give full faith and credit to the Nebraska judgment, and that normal *res judicata* principles were not applicable because the controversy involved land and a court in Missouri was therefore free to retry the question of the Nebraska court's jurisdiction over the subject matter. The Supreme Court granted *certiorari*, reversed the judgment of the Court of Appeals and affirmed the

judgment of the District Court. The court noted that the full faith and credit clause of the constitution generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it. To the respondents contention that the Federal Court in Missouri was free independently to determine whether the Nebraska court in fact had jurisdiction over the subject matter, i.e., whether the land in question was actually in Missouri, the court stated that while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of the Supreme Court have carefully delineated the permissible scope of such an inquiry. "From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." This rule was held to be applicable to questions of jurisdiction over the person, as well as jurisdiction over the subject matter and would also apply to a case involving real property. It was argued that an exception to a rule of judicial finality should be made in cases involving real property because of the Supreme Court's emphatic expressions of the doctrine that courts of one State are completely without jurisdiction directly to effect title to land in other States. This was rejected with the statement: "But the location of land, like the domicile of a party to a divorce action, is a matter 'to be resolved by judicial determination.'"

The court in *Durfee* went on to emphasize that all that was determined in the Nebraska litigation was title to the land in question as between the parties to the litigation there. They note that nothing there decided, and nothing that could be decided in litigation between the same parties in Missouri, could bind either Missouri or Nebraska with respect to any controversy they might have, now or in the future, as to the location of the boundary between them or as to their respective sovereignty over the land in question. Either State may at any time protect its interest by initiating independent judicial proceedings in the Supreme Court.

We see no need here for devoting effort to the definition of judicial jurisdiction or due process of law. The generally understood meanings and applications of those terms will suffice for this appeal.

In our view, the real issue that emerges is essentially factual. The issues here are closely aligned with those in *Durfee* v. *Duke* and we deem the principles applied in that case controlling rather than those in *Western Union Telegraph Company* v. *Commonwealth of Pennsylvania*. Upon which side of the boundary line between the States of Illinois and Kentucky does Dog Island lie? If in Illinois, then the circuit court of Pope County does have jurisdiction and the defendants, having had notice and opportunity to appear and defend, will not be deprived of due process if the case proceeds in that court. If it is determined that it lies in Kentucky, then the Illinois court would be without judicial jurisdiction to render a valid judgment since jurisdiction of Illinois courts cannot constitutionally extend beyond its own boundaries.

It is so distinctly clear as to require no citation of authority that only the parties to a case will be bound

by any judgment order that may ensue from litigation. This is pointedly so with respect to any interest that is now or may be claimed by the State of Kentucky. That State is not a party. The complaint of the plaintiffs does not involve Kentucky in any way. The defendants cannot avoid their prospective liability to the State of Illinois by saying only that they might be liable to Kentucky for the same types of taxes imposed on the same activity described in plaintiffs' complaint. Yet, this is essentially their position here. Such an assertion on their part is not sufficient to deny an Illinois court the right to inquire into its judicial jurisdiction over the subject matter here. The allegation of the complaint is that Dog Island is, and has been at all times pertinent to the case, a part of Illinois. It is a question of fact and accordingly demanding of proof. Defendants' motion to dismiss admits the location of Dog Island as the complaint alleges it to be. The affidavit and exhibits A and B thereto attached are insufficient to refute the complaint. The affidavit states only that various departments of the State of Kentucky have claimed that Dog Island is in Kentucky and defendants are subject to its taxes. The exhibit A letter claims notice that defendants are engaged in a joint venture in the "vicinity" of Dog Island and that Kentucky claims jurisdiction to the low-water mark on the northern shore of the Ohio River. The exhibit B letter notifies defendants that Kentucky claims defendants will be liable for taxation by it in the construction of the Ohio River dam "at or near what is known as Dog Allen." (sic) It also states that "Dog Allen" (sic) is south of the Ohio River low-water mark on the river's northwest shore and therefore a part of Kentucky.

The State of Ilinois is not seeking to tax property or activity in Kentucky, nor is it claiming the power to tax because of some incidence or connection with some activity in Kentucky. Rather, it is asserting judicial jurisdiction over activity wholly withn its own boundary. If the plaintiffs succeed in establishing as fact what they allege in their complaint, clearly they will be entitled to the relief they seek. Nothing appears at this juncture that will deprive the Illinois court of jurisdiction. Indisputably, the defendants will not be foreclosed from proof that, as a matter of fact, Dog Island is a part of Kentucky, and the Illinois court is accordingly without jurisdiction to render a valid judgment. But the Illinois court, under the rules of judicial jurisdiction and *res judicata* discussed in the *Durfee* case, may receive evidence regarding the location of Dog Island with reference to the State boundary line, and therefrom make a determination of its jurisdiction.

We do not see this action as an intrusion into the exclusive jurisdiction over disputes between States conferred upon the Supreme Court by article III, section 2 of the Constitution of the United States. There is no legal dispute with respect to the location of the Illinois-Kentucky boundary. The two States are not in contention here nor are the issues tendered in the complaint sufficient to engage them in controversy. The State of Illinois cannot in this proceeding divest Kentucky of its claim to territory nor can it change the existing boundary line. It is not attempting to do so.

The situation here is analogous to that in the case of *Joyce-Watkins Co.* v. *Industrial Commission* where the court met an argument similar to that of defendants' here

by saying: "We would not be justified in this proceeding, where the State of Illinois is not represented, to determine the boundary line between this State and the State of Kentucky. That question is of far too great importance to be heard without the appearance of the State. It is sufficient in this proceeding to determine whether or not the (Industrial) commission and the circuit court were justified in holding that Minley was within the jurisdiction of Illinois (at the time of an injury)." Like principles were also applied in *Uhlhorn* v. *U.S. Gypsum Company*, 366 F. 2d 211, where a contention was made that a tract of land in question was beyond the jurisdiction of the court because of a boundary change wrought by accretion in a river bed. Confronted with this argument the court held that the District Court had power to make a determination of its jurisdiction and the Circuit Court of Appeals would have jurisdiction to review the finding. The court said: " * * * the issues here do not involve the changing or establishing of the boundary line between sister states so that original jurisdiction lies with the Supreme Court of the United States. (Citation.) We simply decide the location of an established boundary. (Citations.)"

We cannot agree that this case bears a similarity to that of *Western Union Telegraph Company* v. *Commonwealth of Pennsylvania*. It is distinguishable not only on the basis of the parties involved but the subject matter as well. In the *Western Union Telegraph Company* case the subject matter was intangible personal property which a State sought to escheat. Once escheated the property would disappear with the result that Western Union could be left liable over to other claimants in other States and thereby deprived of its property without due process

of law. In contrast, whatever the outcome of this case, Dog Island, being realty, will doubtless remain intact and in place and the State of Kentucky will be free at any time to litigate any claims it may have respecting its boundary rights and territorial integrity.

Other matters raised by defendants in their motion to dismiss were not ruled upon by the trial court and accordingly we will not pass upon them here.

For the foregoing reasons we find that the defendants will not be deprived of due process of law if the case proceeds in the circuit court of Pope County, Illinois. Accordingly, the order of the circuit court of Pope County, Illinois dismissing plaintiffs' complaint is reversed and the cause remanded for further proceedings.

Reversed and remanded.

CONCUR: /s/ George J. Moran

CONCUR: /s/ Caswell J. Crebs

Publish in full.

APPENDIX B

ILLINOIS INCOME TAX ACT

C. 120 § 3—304. Because income of persons other than residents. (a) In general. The business income of a person other than a resident shall be allocated to this State if such person's business income is derived solely from this State. If a person other than a resident derives business income from this State and one or more other states, and, except as otherwise provided by this Section, such person's business income shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the sum of the property factor (if any), the payroll factor (if any) and the sales factor (if any), and the denominator of which is 3 reduced by the number of factors which have a denominator of zero.

(1) Property factor.

(A) The property factor is a fraction, the numerator of which is the average value of the person's real and tangible personal property owned or rented and used in the trade or business in this State during the taxable year and the denominator of which is the average value of all the person's real and tangible personal property owned or rented and used in the trade or business during the taxable year.

• • •

(2) Payroll factor.

(A) The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the taxable year by the person for compensation, and the denominator of which is the total compensation paid everywhere during the taxable year.

(B) Compensation is paid in this State, if:

(i) The individual's service is performed entirely within this State;

• • •

(3) Sales factor.

(A) The sales factor is a fraction, the numerator of which is the total sales of the person in this State during the taxable years, and the denominator of which is the total sales of the person everywhere during the taxable year.

• • •

(C) Sales, other than sales of tangible personal property, are in this State if:

(i) The income-producing activity is performed in this State; . . .

• • •

7—701. § 701.

ILLINOIS UNEMPLOYMENT COMPENSATION ACT

C. 48 § 317. Employment—Services included.] § 207. The term "employment" shall include an individual's entire service, within or both within and without this State, if

A. The service is localized in this State; . . .

• • •

KENTUCKY INCOME TAX LAW

KRS 141.120 Division of income of interstate business for tax purposes.

(9) All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

(a) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

(b) The payroll factor is a fraction, the numerator of which is the total amount paid or payable in this state during the tax period by the taxpayer for compensation, and the denominator of which is the total compensation paid or payable everywhere during the tax period. Compensation is paid or payable in this state if:

1. The individual's service is performed entirely within the state; or

(c) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

3. Sales, other than sales of tangible personal property, are in this state if the income-producing activity is performed in this state; or the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

KENTUCKY UNEMPLOYMENT COMPENSATION ACT

KRS 311.050. Covered employment.

(2) The term "covered employment" shall include:

(a) An individual's entire service, performed within, or both within and without, this state if the service is localized in this state. Service shall be deemed to be localized within a state if:

1. The service is performed entirely with such state . . .

SUPREME COURT U.S.
FILED
MAR 14
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-963

DRAVO CORPORATION, S. J. GROVES & SONS CORPORATION and GUST K. NEWBERG CONSTRUCTION CO.,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, ATTORNEY GENERAL, DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS and BARNEY J. GRABIEC, DIRECTOR OF THE DEPARTMENT OF LABOR OF THE STATE OF ILLINOIS,

Respondents,

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents,

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This brief in opposition to petitioners' request for a writ of certiorari is written upon order of this Court.

(A) Prefatory Remarks.

Petitioners' brief conveys a totally erroneous impression which, upon proper analysis, finds no basis in the factual posture of the case as presented in the Illinois courts. Petitioners attempt to draw in their brief a picture of a taxpayer badgered and harassed by the governmental taxing machines of Illinois and Kentucky, each of them forcing the taxpayer to pay taxes for activities conducted by him on the same property that gives rise to the tax liability. This simply is not so. Rather the case presents the question whether the State of Illinois and its agencies may properly invoke the jurisdiction of their courts to have the liability of companies for payment of Illinois taxes and the obligation of these companies to abide by applicable Illinois laws established in their courts if that liability and obligation arise from work performed by the companies on certain land which the companies claim lies in another state. The obvious answer to this question must be in the affirmative, and the Illinois Appellate Court against whose decision the certiorari petition is directed has so held. Were it otherwise, a State, such as Illinois, acting through its courts, would be deprived of the power to determine whether a piece of land lies within its territory, and, therefore, is subject to its laws; if the State could not proceed in such manner, it would lose its judicial power and consequently one of the most basic attributes of its sovereignty in every case in which it asserts its authority over a lot of real estate and the defendant claims that the lot in question lies in another state. Loss of jurisdictional power in such an instance would be rank

absurdity. Yet, this is precisely what petitioners attempt to accomplish. No violation of due process is involved, even with the contrived addition by petitioners of facts not contained in the record.

Thus, petitioners, on page eight (footnote 2) of their petition, allege that they made some payments of Kentucky taxes "during the pendencey [sic] of the Illinois proceedings" and then withheld such payments after the decision of the Illinois Supreme Court which denied petitioners leave to appeal. They also allege that the State of Kentucky has begun proceedings to collect taxes from petitioners.

There is no support whatsoever in the record for these alleged "facts" nor is there any reference made to any place in the record or Appendix, bearing out these averments. Hence any mentioning of these "facts" is, to say the least, highly improper.

It should also be emphasized that petitioners never stated in the proceedings before the Illinois courts that they paid any taxes to Kentucky. As a matter of fact, the letters attached by petitioners-defendants to their motion to dismiss respondents-plaintiffs' complaint, which letters purportedly showed that Kentucky had claimed taxes from petitioners, "were dated almost a month after the filing of the complaint." (Opinion of Ill. App. Court, Petitioners' Br. 23).

Yet, even if petitioners had paid such taxes to Kentucky after the Illinois proceedings had been instituted and were pending, this was done on their own volition, and they cannot by this device establish for themselves the sovereignty of a State over a piece of land and defeat the jurisdiction of the Illinois courts to determine whether that land which gives rise to tax liability is located within the territorial limits of Illinois. This holds particularly true in the pres-

ent case where the boundary as such between Illinois and Kentucky is not in dispute; that boundary extends to a line representing the lower water mark on the northwest shore of the Ohio River.

(B) The Facts.

In August 1971, respondents filed a complaint for a declaratory judgment against petitioners in the Circuit Court of Pope County, Illinois. The complaint alleged that the petitioners were engaged in construction and other work on so-called Dog Island in the Ohio River near Hamletsburg in Pope County, Illinois. The complaint also alleged that Dog Island was within Illinois' territorial limits according to the location of the Illinois-Kentucky boundary line in the Ohio River.

Respondents' complaint asked the court to declare that Dog Island was within Illinois' territorial limits and that petitioners were required to comply with Illinois' Income Tax and Unemployment Compensation statutes, as well as other applicable Illinois laws.

Petitioners moved to dismiss the complaint, averring, among other things, that Kentucky had claimed Dog Island to be within Kentucky's territorial jurisdiction and that petitioners were alleged to be liable for certain Kentucky taxes. Two letters from Kentucky officials, dated almost a month after the filing of the complaint, were submitted as sole evidence of Kentucky's alleged claims.

Petitioners' motion to dismiss alleged, in pertinent part, that (a) the dispute was between Illinois and Kentucky and therefore within the exclusive jurisdiction of the United States Supreme Court, and (b) since a decision by the trial court could not bar proceedings by Kentucky in its own courts it would be a denial of petitioners' Fourteenth Amendment rights for the trial court to maintain juris-

diction. The Circuit Court, without going into the merits of the case, summarily dismissed the comlaint on due process grounds, as quoted on pg. 4 of the petition.

The Illinois Appellate Court for the Fifth District reversed and remanded, holding that the trial court should determine in what state Dog Island was located. The Appellate Court also rejected petitioners' due process contentions under the posture of the case as presented to it.

The Supreme Court of Illinois denied petitioners leave to appeal. Petition for a writ of certiorari was docketed in this Court on December 21, 1973.

QUESTIONS PRESENTED

1. Is a writ of certiorari for alleged deprivation of property in violation of due process proper and justified if the writ is based upon the conjecture that petitioner might be subjected to double taxation by two states but no final judgment has been rendered by the state court, against which the certiorari petition is directed, that tax liability will be imposed upon petitioner, and the imposition of such tax liability is presently uncertain and will have to await a trial on the merits?

2. May a state invoke the jurisdiction of its courts to have the liability of certain companies for the payment of state taxes determined by these courts if that liability arises from work performed by the companies on land claimed by the companies to lie in an adjacent state, and does the mere invoking of such jurisdiction deprive the companies of due process of law simply because the state courts may ultimately, upon a trial on the merits, determine that the land constituting the source of the alleged tax liability, does lie in the state which has invoked the jurisdiction of its courts?

ARGUMENT

I.

THE CAUSE IS NOT WITHIN THE CERTIORARI JURISDICTION OF THIS COURT SINCE THE ORDER OF THE ILLINOIS APPELLATE COURT IS NOT A FINAL ORDER WITHIN THE PROVISIONS OF 28 USC § 1257(3).

The decision of the Illinois Appellate Court against which the petition for certiorari is directed merely determined whether it was proper for the trial court to summarily dismiss respondents' complaint upon petitioners' motion to dismiss the action. In its order, the Illinois Appellate Court reversed the decision of the lower court and remanded the case for trial.

No trial was ever held on the merits of this case; thus, there is no final decision determining whether Dog Island is within the territorial jurisdiction of Illinois and whether petitioners are liable for Illinois taxes and in what amount.

The jurisdiction of this Court in certiorari matters emanating from State courts is narrowly defined by the pertinent statute, 28 USC § 1257(3). The granting of writs of certiorari is limited to cases involving "final judgments or decrees rendered by the highest court of a state in which a decision could be had. . . ." Since no final judgment on the merits was granted in this case, it does not fall within this Court's certiorari jurisdiction and, therefore, is not a properly cognizable controversy ripe for adjudication by this Court.

This Court has long held that a judgment or decree of the highest court of a state, reversing an inferior court and remanding the case to the lower court for trial or

for further proceedings consistent with the judgment of the reviewing court, is not a final judgment and will not be reviewed by this Court.

Thus, as early as 1827, this Court held in *Winn* v. *Jackson*, 25 U.S. (12 Wheat) 135 (1827), that a state court judgment, which had sustained the validity of a state statute against the contention that it was repugnant to the United States Constitution and reversed the decision of the lower court, was not a final judgment within the meaning of the Judiciary Act of 1789, when the state reviewing court had remanded the case to the lower court for further proceedings.

In *Bostwick* v. *Brinkerhoff*, 106 U.S. 3 (1882), this Court found that the jurisdictional requirement of finality of the highest state court judgment meant that the state court judgment must terminate the litigation between the parties on the merits so that, if this Court should affirm the decision, the state trial court would have nothing to do but execute the judgment or decree.

In *Louisiana Nav. Co.* v. *Oyster Commission*, 226 U.S. 99, 57 L.ed. 138, 33 S.Ct. 78 (1912), the Louisiana Supreme Court had reversed a judgment of the trial court which had dismissed plaintiff's petition involving so-called slander of title of plaintiff to described lands, because the petition failed to state a cause of action. The Louisiana Supreme Court was of the opinion that plaintiff should again be afforded an opportunity to amend its petition and remanded the case to the trial court for the indicated purpose. This Court refused to consider the case upon a writ of error which had alleged the existence of federal questions within the cognizance of this Court, and dismissed the case for want of jurisdiction. In doing so this Court pointed out that petitioner had contended that the judgment below was final for the purpose of review by this

Court because the Louisiana Supreme Court practically had finally disposed adversely to plaintiff's title to a substantial part of the lands involved in the suit, hence that the Louisiana Supreme Court, in remanding the cause for further proceedings, had done so only as to other lands. This Court rejected petitioner's contention and declared that it may not be called upon "to review by piecemeal the action of a state court which otherwise would be within its jurisdiction," and, moreover, that, on the question of finality, the form of the judgment of state courts was controlling (226 U.S. 99 at 101, 57 L.ed. 138 at 140).

The *Louisiana Nav. Co.* decision was cited with approval in *Urie* v. *Thompson*, 337 U.S. 163 at 172, 173, 93 L.ed. 1282 at 1294, 69 S.Ct. 1018 (1949) on the point that this Court will exercise jurisdiction only if the state court judgments are final.

See also *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 59 L.ed. 1027, 35 S.Ct. 625 (1915), and *Cohen* v. *New York*, 385 U.S. 976, 17 L.ed. 2d 438, 87 S.Ct. 505 (1966), in which this Court refused to grant a writ of certiorari to the Court of Appeals of New York for want of a final judgment in an instance in which the New York trial court had granted petitioners' motion to suppress certain evidence; the state had appealed, the Appellate Division reversed, and the Court of Appeals had affirmed the decision of the Appellate Division (219 N.E. 2d 427).

It must be reiterated that, under the posture of the case as presented to this Court, no final decision of a state court was rendered in the instant case. Since the trial court dismissed the complaint upon petitioners' motion, before an answer had been filed and the issues joined, and the case was remanded by the Appellate Court to the trial court for further proceedings, there is at present no certainty as to the final determination of this matter by the

trial court. Respondents-plaintiffs might never be able to prove that the disputed land was located within the boundaries of the State of Illinois; hence petitioners might never be liable to pay any taxes to the State of Illinois. Yet, that being the case, how could it possibly be argued that petitioners will be deprived of due process of law if the Illinois proceedings continue? Admittedly, for the time being, petitioners do not pay any taxes relating to their activities, either to Illinois or to Kentucky, having in the meantime successfully played off one state against the other. Since it is, as repeatedly emphasized, at the present time totally uncertain whether they ever will be found liable for the payment of any Illinois taxes, petitioners' request for the exercise of jurisdiction by this Court is based solely upon conjecture. Under these circumstances the matter is not ripe for determination by this Court, and a granting of a writ of certiorari would be a speculative exercise in legal futility.

II.

THE DECISION OF THE ILLINOIS APPELLATE COURT DOES NOT VIOLATE PETITIONERS' RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A.

Petitioners' Reference to Alleged Facts Not Contained in the Record Is Improper.

Petitioners, in their argument, assert on pg. eight (footnote 2) of their petition that they have paid Kentucky taxes during the "pendencey" [sic] of the Illinois proceedings and that the State of Kentucky has begun judicial proceedings against petitioners for the enforcement of taxes claimed by Kentucky.

Respondents strongly object to the inclusion of these alleged "facts" in the petition since they appear nowhere in the record. In *Hedgebeth* v. *State of North Carolina*, 334 U.S. 806 at 807, 92 L.ed. 1739 at 1740, 68 S.Ct. 727 (1948), it was declared that, in reviewing a judgment of a state court, this Court will be bound by the record on which the judgment was based. In *Henneford* v. *Northern Pacific Railroad Co.*, 303 U.S. 17 (1938), in which appellee tried to submit information not in the record on the amount of a tax he had paid, this Court disregarded the proffered information, decided the case on the record alone and dismissed the cause for want of jurisdiction. In *Standard Vacuum Oil Co.* v. *United States*, 339 U.S. 157, 94 L.ed. 731, 70 S.Ct. 545 (1950), this Court was urged to consider facts not in the record; it said (339 U.S. 157 at 160, 94 L.ed. 731 at 733, 734): "But we cannot consider such allegations in determining the sufficiency of the cause stated. After all, pleadings and the making of a proper record have not been dispensed with. They still have a function to perform. This case points up that function. We will not review questions not clearly raised in the record."

Thus, petitioners' alleged facts of any enforcement proceedings commenced by Kentucky for the payment of taxes relating to Dog Island should and must be disregarded, apart from the total irrelevancy of these "facts" regarding the granting of a writ of certiorari under the present status of the case. Even if such enforcement proceedings had been instituted, the stark fact remains that petitioners are still not deprived of due process, due to the present uncertainty of their tax liability to Illinois. In the event that the Illinois courts should ultimately determine the existence of such a tax liability, there is still no certainty whether Kentucky will then persist in its tax demands against petitioners, will not recognize Illinois' claim and judgment, or reach an under-

standing in the form of a compact with Illinois relating to Dog Island. All this is, of course, rankest speculation which points up the utter fallacy of petitioners' due process arguments.

B.

The Illinois Appellate Court Decision Is Clearly Correct and in Accordance with Well Established Legal Principles.

The decision of the Illinois Appellate Court is firmly supported by law and logic. Petitioners' reliance on *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71, 71 L.ed. 2d 139, 82 S.Ct. 199 (1961), is ill placed since that decision is totally inapposite and readily distinguishable from the instant case.

In *Western Union*, the Company, a New York corporation with its principal place of business in that state, held a substantial amount of money which was never disbursed because various persons had bought money orders in the Company's offices in Pennsylvania for the purpose of having the money transmitted to payees chiefly in other states; in some instances the money was never claimed either by the designated payee or the payor and, therefore, held by the Company. The Pennsylvania court rendered a judgment of escheat respecting these unclaimed funds; that judgment was set aside by this Court as being violative of the constitutional due process provisions since other states might and actually did claim the same funds under their respective escheat statutes and thereby force the Company to pay a single debt more than once.

In the first place, the *Western Union* decision dealt with **intangible property, involving multi-state transactions,** which by their very nature gave rise to legal relationships concerning a variety of states, such as "the state of residence of the payee, the state of the sender, the state where

the money order was delivered, and the state where the fiscal agent on which the money was drawn . . . [was] located." (7 L.ed. 2d 139 at 143.) Thus multi-state contacts were implicit in these transactions and affected the funds which gave rise to these transactions. For one state, such as Pennsylvania, to ignore the character of these transactions and to assert and carry into final judicial effect an exclusive claim to the funds generated by these multi-state transactions was certainly legally improper. It became even more improper and constitutionally unacceptable, because one other state, namely New York, had been "particularly aggressive, not merely potential, but actual, active and persistent" in its claims for the very same moneys demanded by Pennsylvania, as shown by the fact that New York had "already escheated part of the very funds originally claimed by Pennsylvania." (7 L.ed.2d 139 at 143).

In contradistinction, the present case involves real estate—immobile property—located in a certain territory; it does not concern itself wih intangible property, having originated from multi-state transactions with all its attendant facets. Above all, the judgment of the Pennsylvania court in *Western Union* was final, ordering the escheat of the funds held by Western Union and directing the relinquishment of the property. No final judgment was rendered in the present case, no order issued directing petitioners to pay any Illinois taxes and thereby to relinquish any property. Moreover, unlike *Western Union*, according to the status of the record in the Illinois courts, no "actual, active and persistent" claim of the State of Kentucky to the real estate in question was ever made; the only semblance of a claim appeared in two letters of Kentucky officials, dated almost a month after the filing of the complaint, asking petitioners for the payment of taxes relating to the real estate because the property was

supposedly located in Kentucky. But the record in the Illinois courts is barren of any legal action taken by Kentucky to aggressively and persistently pursue its claim; neither is there any thing contained in the record which shows that petitioners have recognized Kentucky's claim. This is especially true in view of petitioners' new statement, made for the first time in their certiorari petition, that they had paid taxes to Kentucky during the pendency of the Illinois proceedings but then discontinued these payments. Thus, the inference previously made by respondents, seems justified that petitioners, under the guise of a pretended and conjectural due process violation, play off one state against the other and thereby avoid the payment of any taxes to either state.

Since Kentucky has not actively and aggressively pursued its claim to the property in question, the present case is more closely related to *Standard Oil Co* v. *State of New Jersey*, 341 U.S. 428, 95 L. Ed. 1078, 71 S. Ct. 822 (1951), cited by the Illinois Appellate Court, than *Western Union*. This Court distinguished *Western Union* from *Standard Oil*. In *Standard Oil* the company had appealed from a judgment of the New Jersey Supreme Court which had escheated to the state unclaimed stock certificates and undelivered dividends of the company. Standard Oil claimed in its appeal to this Court, among other things, that it was deprived of property without due process because the New Jersey escheat statute and judgment were "no protection beyond the state against owners of the escheated shares or against escheat or conservation actions by other states against Standard Oil of New Jersey for the same debts or demands due from Standard to its stockholders." (341 U.S. 428 at 442). Mr. Justice Reed, speaking for the majority of the Court, in affirming the New Jersey judgment tersely rejected that argument and

said that the claim of no other state to the property was before the United States Supreme Court, and determination of any right of a claimant state against New Jersey for the escheated property had to await presentation before the United States Supreme Court. (341 U.S. 428 at 443, 71 S.Ct. 822 at 831).

The case of *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292, 82 L.ed. 268 (1937), offers a much better analogy than *Western Union*. In that case the executor under a decedent's last will which had been probated in Massachusetts filed an interpleader suit in the U. S. District Court in Massachusetts, joining as defendants Massachusetts and California state officials who had been entrusted with the duty administering death tax statutes in their respective states. The complaint alleged that decedent had left bank deposits and other intangibles in California and Massachusetts, a substantial part of which had come into the petitioner's possession; that the California taxing officials had asserted that decedent at the time of death was domiciled in California and that under the law of that state the decendent's estate was subject to death taxes upon all his intangibles; that the Massachusetts Commissioner, in behalf of the state, asserted a similar claim that decedent at death was domiciled in Massachusetts, and that his estate was subject to taxes there upon all intangibles: that it was impossible in law and in fact for decedent to have been domiciled in both states at the time of death; and that the attempted collection of the tax was a threatened deprivation of property without due process of law and a denial of equal protection of the laws. The U. S. District Court issued a temporary injunction restraining defendants, until further order of the court, from taking any action to assess the tax. The Court

of Appeals reversed, holding, upon the motion of the California state officials filed in the trial court, that the maintenance of the suit was an infringement of the Eleventh Amendment to the U. S. Constitution.

This Court affirmed the judgment of the Court of Appeals, and, in doing so, emphasized that although the complaint stated that the California officials had "determined" that decedent was domiciled in California, it was not contended that they had assumed authority to assess the tax, "independently of the judgment of a court." (302 U.S. 292 at 298, 82 L.ed. 268 at 274.) The Court then, speaking through Mr. Justice Stone, made the following characteristic statement, equally applicable to the instant case (302 U.S. 292 at 298, 299, 82 L.ed. 268 at 275):

> Petitioner's real concern is that the judgment of the California court, if it should decide that defendant was domiciled there, may be erroneous or may conflict with that of the Massachusetts courts. But conflicting decisions upon the same issue of fact do not necessarily connote erroneous judicial action. Differences in proof and the latitude necessarily allowed to the trier of fact in each case to weigh and draw inferences from evidence and to pass upon the credibility of witnesses, might lead an appellate court to conclude that in none is the judgment erroneous. **In any case the Constitution of the United States does not guarantee that the decisions of state courts shall be free from error** [cases cited], **or require that pronouncements shall be consistent.** [Cases cited]. **Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries.** [Cases cited]. **Hence it cannot be said that the threatened action of respondents involves any breach of state law or of**

the laws or Constitution of the United States [Emphasis supplied.]

In the present case, too, there is merely an assertion on the part of Kentucky officials that they would claim the payment of taxes for petitioners. There is no judgment of either a Kentucky court or any other court in existence that the land in question upon the location of which the validity of the taxes depends, is situated in Kentucky. Under these circumstances the Illinois courts have the perfect right, nay the duty, to proceed with the lawsuit and to ascertain the location of the property. Just as the determination of the decedent's domicile in the *Worcester County Trust Company* case could properly be left to the court of the state in which the decedent was allegedly domiciled, so may the Illinois courts, appropriately and lawfully, ascertain the location of the real estate, upon which the exertion of the Illinois state power depends; in doing so they infringe in no way upon the constitutional due process provisions.

Petitioners' attempt to denigrate the importance of the case of *Durfee* v. *Duke*, 375 U.S. 106, 11 L.ed. 2d 186, 84 S.Ct. 242 (1963), relied upon by the Illinois Appellate Court, for the resolution of the present controversy is indeed ill conceived. *Durfee* constitutes clear-cut authority that a state court has the power to determine the fact of the location of real estate within its boundaries in the face of defendant's claim that the property is located in a neighboring state and hence that the court lacks the jurisdictional power to proceed in the case. The fact that the *Durfee* case involved a dispute between two non-sovereign litigants is totally immaterial as far as the question of judicial power is concerned which is the basic underlying issue of the present dispute. Equally spurious is petitioners' argument that in *Durfee* all claimants of interest were

before the Nebraska Court while this is supposedly not true in the present case since Kentucky was not before the Illinois Court. In the first place Kentucky is not a claimant in interest, having never actively and aggressively asserted and pursued a claim to the property in question; the only claim in that respect was put forth by petitioners, just as the defendant in the *Durfee* case made the claim that the property was located in Missouri. Moreover, when the defendant in the *Durfee* case advanced the claim that the property which was the subject matter of the dispute was located in Missouri, certainly Missouri had more than an abstract interest in the outcome of the litigation; but that interest was, as this Court recognized, not sufficient to deprive the Nebraska court of the power to determine the jurisdictional fact of the location of the property upon which the exercise of the court's and thereby the state's authority depended, and, after a proper finding, to proceed with the resolution of the controversy.

Petitioners' argument that the present case, in distinction to *Durfee*, involves a dispute between Illinois, Kentucky, and petitioners, is simply not true. As repeatedly emphasized, based on the record, Kentucky is not a claimant in interest, and has not made an active, aggressive claim to the property. Only respondents and petitioners are involved in the present controversy.

Equally inapposite is petitioners' reference to *Texas* v. *Florida*, 306 U.S. 399 (1939). This Court did not exercise original jurisdiction because of a claim of due process violation; it asserted original jurisdiction solely because one sovereign state directly sued another in this Court and a substantial risk existed that the state of domicile would not get its tax claim satisfied because the estate to be taxed was insufficient. In the case at bar, there is, as re-

peatedly pointed out, no direct controversy between states.

In this connection it should be stressed that petitioners' reference to *Iowa* v. *Illinois*, 147 U.S. 1 (1892), and the inferences drawn therefrom, are ill at place since that case, unlike the present, involved a boundary dispute between two states, in which the boundary had not been determined.

CONCLUSION

Petitioners, in their brief, based in part upon "facts" not found in the record, attempt to obtain a writ of certiorari for the reason that they were allegedly deprived of property without due process of law. The record in this case manifests beyond any doubt that no deprivation of property has occurred, nor could it have occurred since there has never been a final judgment on the merits of the case. Thus petitioners' contentions are founded upon contrived hypothesis, conjecture, and inapplicable analogies, as well as basic misconceptions of the legal principles involved. For these reasons it is respectfully asked that the writ of certiorari sought by petitioners be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-963

DRAVO CORPORATION, S. J. GROVES & SONS CORPORATION and GUST K. NEWBERG CONSTRUCTION CO.,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, ATTORNEY GENERAL, DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS and BARNEY J. GRABIEC, DIRECTOR OF THE DEPARTMENT OF LABOR OF THE STATE OF ILLINOIS,

Respondents,

PETITIONERS' REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

I.

THE ORDER BELOW IS CLEARLY FINAL WITHIN THE MEANING OF 28 USC § 1257 AS INTERPRETED BY THIS COURT.

Respondent takes the position in its brief that the decision of the Illinois Appellate Court is not final inasmuch as the Appellate Court reversed and remanded the cause to the trial court for trial. The State argues, "Respondents-Plaintiffs might never be able to prove that the disputed land was located within the boundaries of the State of Illinois . . ." The State thus urges upon this Court the argument that this Court should refuse review because the State's position might be held to be wrong in the lower courts. He makes no mention of the consequences if both Illinois and Kentucky courts find in favor of such respective states.

While we are unable intelligently to come to grips with an argument which proceeds from the premise that the State Courts should be permitted to try this case because the State Court might find the State's position erroneous, prior decisions of this Court have made it clear that the principle of finality as expressed in Section 1257 is not meant to deny the jurisdiction of this Court to adjudicate ripe constitutional issues in the circumstances here presented.

This Court has consistently recognized that superficial lack of finality is not a bar to review of questions of constitutional rights where such questions are in fact ripe for review in the posture of the record.

In *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 9 L. Ed. 2d 523, 83 S. Ct. 520, this Court held that an

order determining venue had the requisite finality to invoke the jurisdiction of the Supreme Court. Upholding it's jurisdiction, the Court said, in language particularly descriptive of the situation before the Court in the instant case:

> ". . . Moreover, we believe that it serves the policy underlying the requirement of finality in 28 USC § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings . . ." (371 U.S. at 558)

In *Mills* v. *Alabama*, 384 U.S. 214, 16 L. Ed. 2d 484, 86 S. Ct. 1434, the Court said:

> "The State has moved to dismiss this appeal on the ground that the Alabama Supreme Court's judgment is not a 'final judgment' and therefore not appealable under § 1257. The State argues that since the Alabama Supreme Court remanded the case to the trial court for further proceedings not inconsistent with its opinion (which would include a trial), the Supreme Court's judgment cannot be considered 'final.' This argument has a surface plausibility, since it is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did, and he therefore has no defense in the Alabama trial court. Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional conten-

tions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." (384 U.S. at 217)

In *Local No. 438 Construction Laborers* v. *Curry*, 371 U.S. 542, 9 L. Ed. 2d 514, 83 S. Ct. 531, this Court, in agreeing to determine whether a temporary injunction had been properly issued, said at 371 U.S. 548:

". . . The federal question raised by petitioner in the Georgia court, and here, is whether the Georgia courts had power to proceed with and determine this controversy. The issue ripe for review is not whether a Georgia court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction (compare *Gibbons v. Ogden* (US) 6 Wheat 448, 5 L. Ed. 302) nor is it the question of whether federal or state law governs a case properly before the Georgia courts. Compare *Teamsters, C. W. & H.* v. *Lucas Flour Co.*, 369 U.S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571. What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board."

In the instant case the issue is whether the Illinois Court has jurisdiction to proceed to determine the location of Dog Island in the face of the claim of jurisdiction over this Island by Kentucky. This issue was squarely passed upon by the trial court, which decided it did not have such jurisdiction, and by the Appellate Court, which

decided that the trial court had jurisdiction. A refusal to review this constitutional issue in the framework of the record as presented to this Court in the instant case, which clearly raises the constitutional issue, will subject not only the parties but also the State of Kentucky to a long, complex, expensive, and, perhaps worse, frustrating litigation, because, in view of the principles set forth in the Petition for Certiorari, decisions of the Courts of each State cumulatively determining that the Island lies in Illinois *and* Kentucky simply cannot stand. The legal issue of jurisdiction cannot be changed by trial—under the reasoning of *Mills*, *Langdeau* and *Curry*, *Supra*, it is entirely proper for this Court to review the decision below at this time.

A last point should be noted respecting finality.

In *Western Union* v. *Commonwealth of Pennsylvania*, 368 U.S. 71, 82 S. Ct. 199, 7 L. Ed. 2d 139 (1961), this Court, after noting that there were conflicting claims to the property involved, and that the Pennsylvania Courts had no power to adjudicate the claim of New York, said:

> "When this situation developed the Pennsylvania Courts should have dismissed the case." (368 U.S. 80)

Thus, the holding of this Court in *Western Union* was not simply that it would be a denial of due process for Western Union to be required to pay the same funds to each State, but also that it was a denial of due process of law for the Pennsylvania Court to proceed to adjudicate the liability of *Western Union* where it was unable to also adjudicate the claim of another contending State.

In this light the order appealed from is indeed final, as affecting a deprivation of due process of law because further adjudication by the Illinois Court, in the absence of Kentucky, is itself a violation of due process.

II.

THE RECORD CLEARLY REFLECTS THAT EACH STATE ACTIVELY CLAIMS JURISDICTION OF DOG ISLAND.

The State, in its brief, does not squarely contend that decisions of Illinois and Kentucky Courts finding the Island to be in both states can stand, but rather, the State implies that Kentucky really doesn't claim this Island. The State then criticizes petitioners for bringing to the Court's attention the fact that Kentucky has actually filed suit against petitioners seeking collection of taxes premised on Kentucky's contention that Dog Island is in Kentucky. We submit that it is entirely appropriate for this Court to take judicial notice of this action. (5 Moores Federal Practice 2d Ed. § 43.09; *MacNiel Bros.* v. *Cohen*, 163 F.S. 106.

We are uncertain as to whether Illinois denies that the suit exists or denies its materiality. To establish the fact of its existence, we reprint as an appendix to this brief the complaint on file in the Kentucky Court, together with a letter from the Clerk of said Court, certifying that said case has been filed and is pending.

Turning to the question of materiality, the action by Kentucky in the Kentucky Court confirms the position of Kentucky, as indicated in the letters from Kentucky taxing officials attached to Respondent's motion to dismiss, that Kentucky indeed claims Dog Island and the right to tax activities thereon. It is apparent from the course of the State's argument that the Attorney General is not interested in purity of the record, but rather is disgruntled that his gratuitous assumptions and inferences

of lack of jeopardy from Kentucky can be rebutted. Incredibly, confronted not only with the assertions of jurisdiction from the taxing authorities as set forth in the motion to dismiss and the fact of existence of the suit by Kentucky, the Attorney General coyly asks this Court to indulge the inference that Kentucky is really not interested. On page 10 he states:

> ". . . Petitioner's alleged facts of any enforcement proceedings commenced by Kentucky for the payment of taxes relating to Dog Island should and must be disregarded . . ."

Certainly, they must be disregarded in order to permit the Court to indulge the Attorney General's inference that Kentucky is not interested, and while the Attorney General may be less than candid, he is certainly consistent, stating further on page 13:

> ". . . Kentucky has not actively and aggressively pursued its claim to the property in question."

Again, apparently fearful that this Court may view the fact of filing suit by Kentucky as an indication that Kentucky intends to assert jurisdiction (and we submit there can be no clearer indication), the Attorney General states:

> ". . . Thus the inference previously made by respondents, seems justified that petitioners, under the guise of a pretended and conjectural due process violation, play off one state against the other and thereby avoid the payment of any taxes to either state."

We submit the record is clear that it is not the petitioners which have created the situation involving adverse claims of the two states, but rather, the states themselves, by asserting their claims in forums which cannot make a determination which will bind all parties. Both states

have the requisite standing to file suit in this Court for resolution of the issue of the location of the Island, while petitioners have no standing to sue the states in any forum.

The Attorney General's urging of *Standard Oil Company* v. *State of New Jersey*, 341 U.S. 428, 95 L. Ed. 1078, 71 S. Ct. 822, is posited in such a manner that he apparently concedes that if Kentucky is actively pursuing its claim, Western Union should control. No further purpose would be served in this brief in reiterating the distinction between the two cases as set forth in the petition. We do wish to point out to the court, however, that *Worcester County Trust Company* v. *Riley*, 302 U.S. 292, 82 L. Ed. 268, 58 S. Ct. 185, underscores the petitioners' dilemma rather than solves it. In that case it was expressly held that one in the position of petitioners could not maintain an action under the Federal Interpleader Act against the states because of the Eleventh Amendment. This was the entire holding of the Court.

It is, therefore, submitted that this court should issue the Writ of Certiorari as prayed.

Respectfully submitted,

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APPENDIX

FRANKLIN CIRCUIT COURT

CIVIL ACTION No. 4398

COMMONWEALTH OF KENTUCKY
EX REL
DIVISION OF UNEMPLOYMENT INSURANCE

PLAINTIFF

v. COMPLAINT

DRAVO CORPORATION
4800 Grand Avenue
Pittsburgh, Pennsylvania

S. J. GROVES & SONS COMPANY
40 Washington Avenue, South
Minneapolis, Minnesota

GUST K. NEWBERG CONSTRUCTION COMPANY
2040 North Ashland Avenue
Chicago, Illinois

DEFENDANTS

The plaintiff, for its cause of action, states that:

1. The defendants (joint venturers) became subject to the Kentucky Unemployment Insurance Law on August 15, 1971 pursuant to KRS 341.070 (6) as joint venturers on a construction project in Kentucky and continued to be subject employers under the Kentucky Unemployment Insurance Law and as such liable for the payment of contributions (taxes) on wages paid to its workers.

2. The defendants (joint venturers) became delinquent in paying all contributions due for the third quarter of 1973 and as a result indebted to the plaintiff in the amount $18,322.89 plus penalty of $181.41 per month beginning December 1, 1973 until paid.

3. Notice of Assessment and Demand for Payment was served on the defendants, but defendants have failed or refused to pay the indebtedness.

4. Failure of the defendants to pay the contributions when due created a statutory lien pursuant to KRS 341.310 in favor of the plaintiff upon all property of the defendants as of the due date, and such lien is on a parity with state, county, municipal ad valorem tax liens and is superior to the lien of any mortgage or other encumbrance created and/or recorded subsequent to the date any liens of the plaintiff were filed in the office of the porper county court clerk.

WHEREFORE, the plaintiff demands judgment against the defendants in the amount of $18,322.89 with penalty thereon of $181.41 per month until paid and further demands that a lien be adjudged for the same amount upon the properties of the defendants.

James G. Childers
Attorney for Plaintiff
Capitol Annex—Room 227
Frankfort, Kentucky 40601
Phone (502) 564-3260

STATE OF KENTUCKY }
COUNTY OF FRANKLIN } SCT:

I, James E. Collins, Clerk of the Franklin Circuit Court, do hereby certify that the foregoing is a true and correct copy of the Complaint wherein Commonwealth of Kentucky ex rel, Division of Unemployment Insurance is Plaintiff and Dravo Corporation, S. J. Groves & Sons Company and Gust K. Newbert Construction Company are Defendants, being Civil Action No. 4398, which appears of record in my office aforesaid.

I further certify that the foregoing action is still pending in the Franklin Circuit Court.

Witness my hand as Clerk of the Franklin Circuit Court, this the 14th day of March, 1974.

JAMES E. COLLINS,
Clerk,
Franklin Circuit Court.

By: PEGGY CALVERT, D.C

[Seal]